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No. 92-854

Supreme Court, U.S.

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**IN THE
Supreme Court of the United States
OCTOBER TERM, 1992**

CENTRAL BANK OF DENVER, N.A.,

v.

Petitioner,

**FIRST INTERSTATE BANK OF DENVER, N.A. and
JACK K. NABER,**

Respondents.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit**

**PETITIONER'S REPLY MEMORANDUM IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI**

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Under the reasoning of Respondents and the Tenth Circuit, Petitioner Central Bank of Denver, N.A. ("Central Bank") can be held liable for aiding and abetting a securities fraud without any finding that it violated its duties as indenture trustee or possessed any fraudulent intent or knowledge of a scheme to defraud. There is simply no support for such a result. Moreover, Respondents cannot conceal the conflict between the Tenth Circuit's holding and that of a majority of the federal circuits that recklessness does not satisfy the scienter requirement for aiding and abetting absent a duty to disclose.

I. CENTRAL BANK WAS NOT RECKLESS WHERE IT MET ITS DUTIES UNDER THE TRUST INDENTURE.

For the reason discussed in Section II of Central Bank's Opening Brief, Central Bank should not be held liable for aiding and abetting a Rule 10b-5 violation based merely on recklessness. However, even if recklessness were sufficient to meet the requirement of scienter, Central Bank could not have been reckless where, as the Tenth Circuit found, it met its duties under the trust indenture. The Tenth Circuit's holding that an indenture trustee may be liable without violating any of its indenture duties directly conflicts with the Trust Indenture Act, which expressly limits the trustee's duties to those set out in the indenture. 15 U.S.C. § 77000 (1988).

Respondents argue that the Trust Indenture Act does not grant trustees immunity for securities fraud. That argument entirely misses the point. Central Bank is not liable because Central Bank met all its duties; therefore, it could not have been reckless. In the securities context, "recklessness" is defined as "an extreme departure from the standards of ordinary care, and which presents a danger . . . that is either known to the defendant or is so obvious that the actor must have been aware of it." *First Interstate Bank v. Pring*, 969 F.2d 891, 903 (10th Cir. 1992) (quoting *Hackbart v. Holmes*, 675 F.2d 1114, 1118 (10th Cir. 1982)). The Tenth Circuit acknowledged that under the Trust Indenture Act a trustee's duties are limited to the terms of the indenture. It then found that Central Bank did not breach any of its indenture duties. Thus, the Tenth Circuit's decision that Central Bank may have been reckless without violating any of its duties as trustee is a logical impossibility.

Central Bank does not claim that the Trust Indenture Act establishes immunity. Liability can surely be based upon conscious intent to defraud even in the absence of a breach of duty, a question the Tenth Circuit has not addressed at this

point. That, however, is not at issue.¹ Respondents' reliance on § 326 of the Trust Indenture Act, 15 U.S.C. § 77zzz (1988), does not explain how Central Bank could have entirely met its duties yet committed an extreme departure from ordinary care. Section 326 merely preserves liability against a trustee who meets his indenture duties but knowingly and consciously participates in a fraud.² It cannot be read to create liability for recklessness when the trustee has met all of his duties as defined under § 315.³

Respondents' attempt to distinguish *Elliott Assoc. v. J. Henry Schroder Bank & Trust Co.*, 838 F.2d 66 (2d Cir. 1988), and *Lorenz v. CSX Corp.*, 736 F. Supp. 650 (W.D. Pa. 1990),

¹ If, on remand, liability can only be imposed on Central Bank upon a finding of actual knowledge or conscious intent, Central Bank must necessarily prevail because Respondents have offered no evidence of either.

² The cases cited by Respondents hold no more. See *Cronin v. Midwestern Oklahoma Dev. Authority*, 619 F.2d 856, 862 (10th Cir. 1980) (trustee liability possible if facts reveal that it "knowingly aided the underwriter in the issuance of value-depleted bonds"); *Lewis v. Marine Midland Grace Trust Co.*, 63 F.R.D. 39, 46 (S.D.N.Y. 1973) ("If the elements alleged in the complaint are substantiated, there can be little doubt of the culpability of all of the defendants as knowing participants in a fraudulent scheme."). *Ross v. Bank South, N.A.*, 837 F.2d 980 (11th Cir. 1988), cited by Respondents, actually supports Central Bank's position. There the court affirmed summary judgment in favor of the indenture trustee based on the lack of "proof that Bank South failed in any way in its duty as indenture trustee." *Id.* at 1003 (emphasis added).

³ Respondents demonstrate their confusion by quoting from Central Bank's own brief to the court below. That passage, taken in context, reads:

While Plaintiffs correctly point out that the Act does not affect "the rights, obligations, duties and liabilities of any person" under the federal securities laws, the burden remains on the Plaintiffs to state a claim under those laws. There can be no claim where there is no breach of duty.

Answer Brief of Defendant-Appellee Central Bank at 29 (emphasis added). Central Bank has never conceded the illogical proposition that recklessness can be established absent a breach of the trustee's duties.

merely because those opinions do not explicitly discuss § 326 is ineffectual. Both courts squarely held that a trustee's duties are defined by the terms of the indenture. The Tenth Circuit's finding that Central Bank may have been reckless while complying with all terms of the Indenture conflicts with these opinions and, more importantly, with § 315 of the Trust Indenture Act of 1939. 15 U.S.C. § 77000 (1988).

II. RESPONDENTS CANNOT AVOID THE CONFLICT BETWEEN THE DECISION BELOW AND A MAJORITY OF THE FEDERAL CIRCUITS.

The Tenth Circuit's decision that recklessness satisfies the scienter requirement for aiding and abetting a securities fraud even when there is no duty to disclose conflicts with the holdings of every circuit which has addressed the issue except the Ninth. Respondents attempt to reconcile the Tenth Circuit's holding with the majority rule by arguing that recklessness is sufficient if there is assistance by action. Upon examination of the facts of the relevant cases, however, Respondents' reconciliation crumbles.

First, in this case the Tenth Circuit characterized Respondents' claim as stemming from Central Bank's "affirmative action" of "agreeing to delay the independent review of the Hastings appraisal." 969 F.2d at 902 (emphasis in original). The Respondents themselves characterize Central Bank's conduct more accurately in their Complaint as inaction, that is, Central Bank's failure to insist upon a prompt independent review of the Hastings appraisal.

Second, the cases cited by Respondents may just as easily be considered instances of "affirmative actions" under the Tenth Circuit's loose standard. See, e.g., *Ross v. Bolton*, 904 F.2d 819, 822-824 (2d Cir. 1990) (defendant allegedly acted as clearing agent for primary violator, financed primary violator's \$1.25 million securities purchase, conducted a telephone conversation with plaintiff and dominated and controlled the primary violator); *IIT v. Cornfeld*, 619 F.2d

909, 915 (2d Cir. 1980) (defendant accountant audited and certified allegedly inaccurate financial statements); *Abell v. Potomac Ins. Co.*, 858 F.2d 1104, 1124-1126 (recklessness insufficient where attorney substantially assisted underwriters' scheme by providing legal advice, allegedly preparing offering statement and allowing name to be used on statement), *cert. denied*, 492 U.S. 918 (1989), and *vacated on other grounds sub nom. Fryar v. Abell*, 432 U.S. 914 (1989); *Camp v. Dema*, 948 F.2d 455, 462 (8th Cir. 1991) (recklessness insufficient where director voted to authorize negotiations to sell company, agreed to sell stock, and waived preemptive rights in the course of allegedly fraudulent transaction). In each of these "inaction" cases, as will virtually always be true, the defendants, like Central Bank, took some affirmative action which under the Tenth Circuit's approach would have permitted a recklessness standard to be applied. Yet in none of these cases did the court find recklessness an adequate standard. Thus, Respondents cannot avoid the conflict between these cases and the Tenth Circuit's decision.

With the Ninth, and now Tenth, Circuits both applying insubstantial, unnecessary distinctions in cases involving a crucial area of national commerce, there is a paramount need for review of this issue.

CONCLUSION

For the foregoing reasons, and the reasons stated in the petition, certiorari should be granted.

Respectfully submitted this 31st day of December, 1992.

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